IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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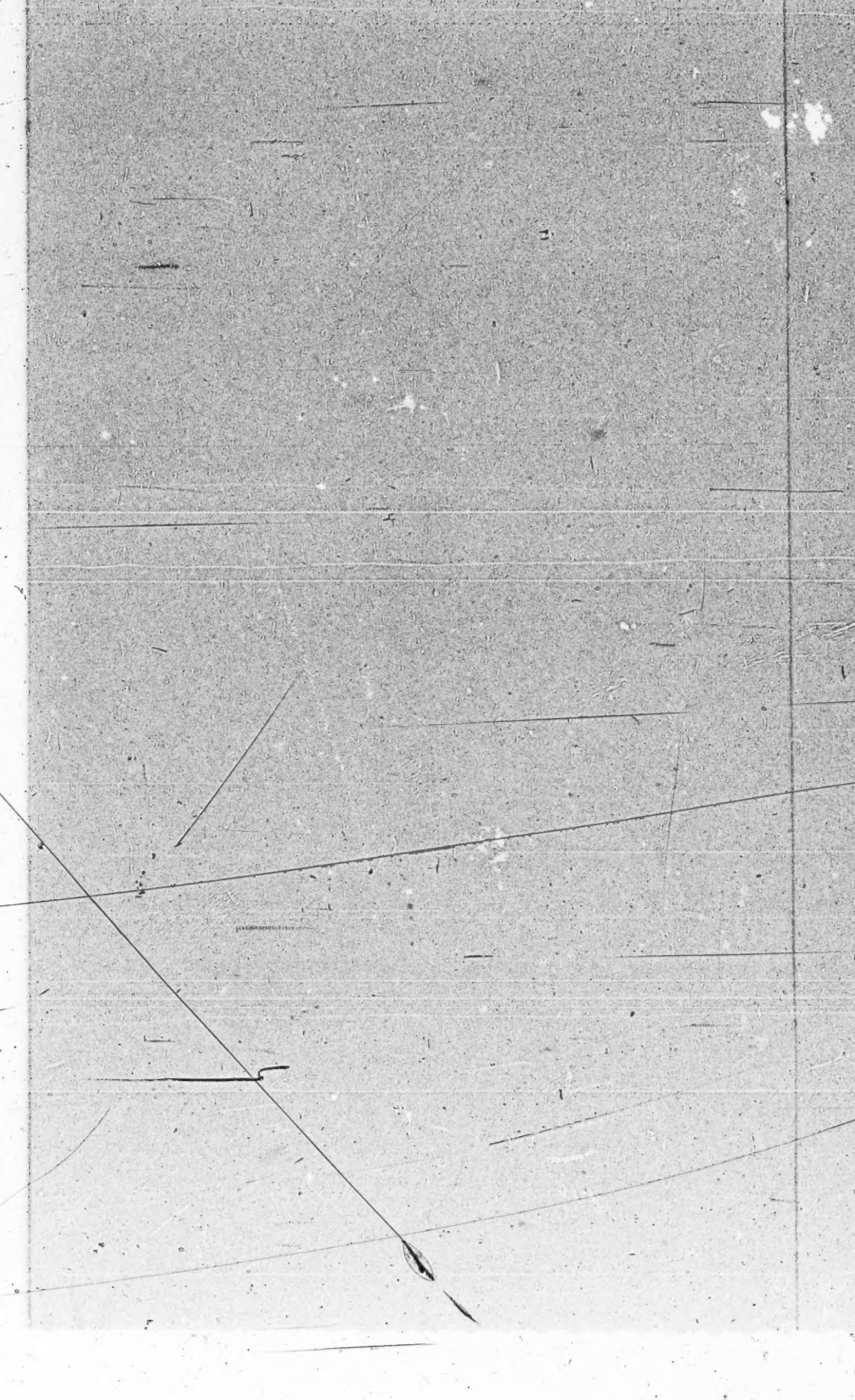

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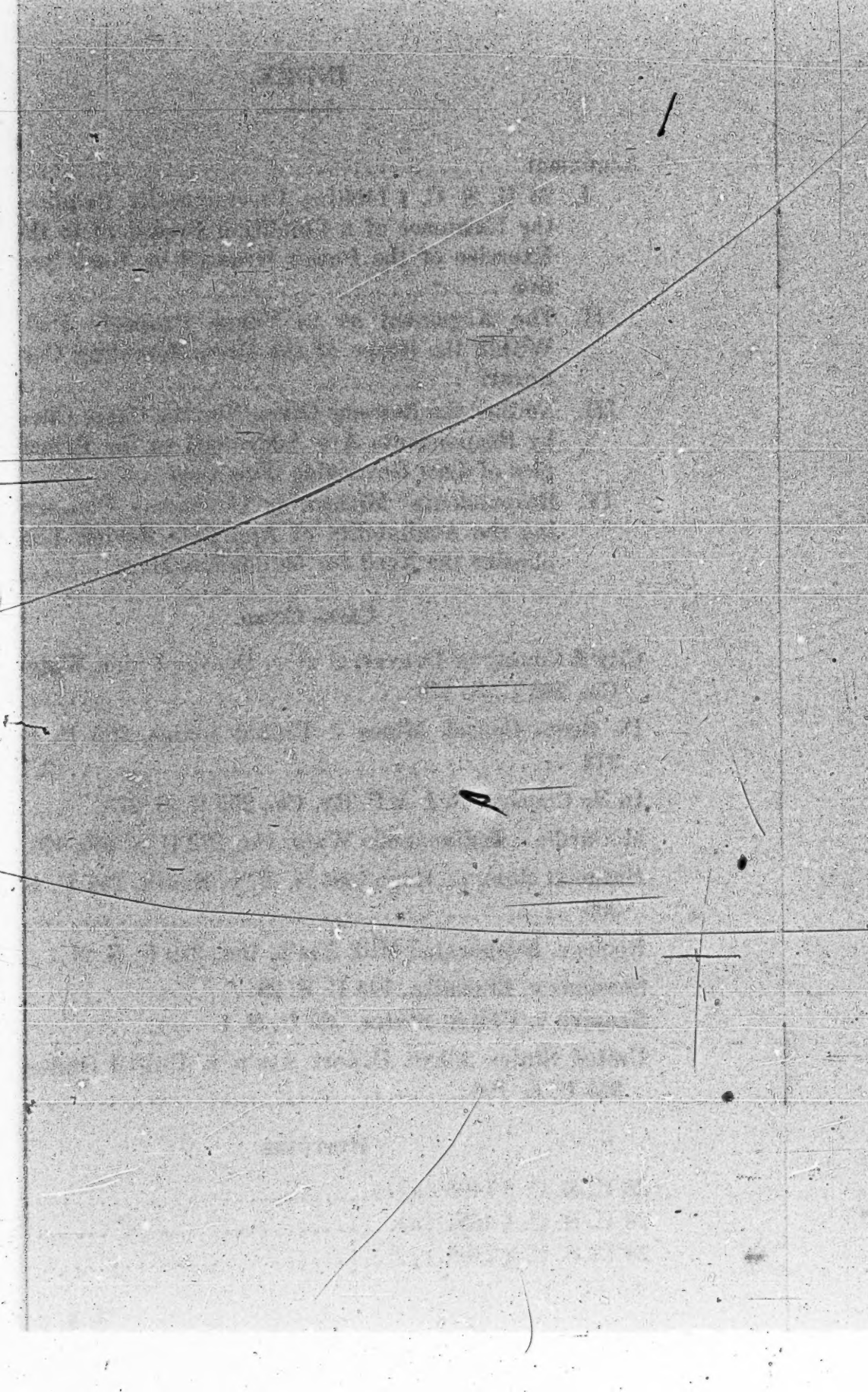

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ARGUMENT.

I.

28 U. S. C. § 1406(a) Unequivocally Requires the Existence of a Condition Precedent to the Exercise of the Power Granted by Such Section.

The necessity for the existence of the condition precedent contained in the Statute, that venue be laid in the wrong division or district, clearly demonstrates that any attempt to invoke this section where the condition is non-existent, is a usurpation of power. Where, as here,

a district judge relies on a fallacious premise to invoke a power so limited, the conclusion must fall with the premise, and his order must be vacated for want of authority to enter it.

Respondents take the position on page 8 of their brief, that:

> "If judicial power exists to make a valid though erroneous decision on a question of venue, then such an erroneous decision is not usurpation of power * * *."

Respondents are actually contending that if the judge mistakenly believed that he had power to enter the order he may have committed error, but did not exceed his statutory authority. Respondents apparently do not understand that power either exists, or it does not, and that it cannot come into existence by erroneous assumption thereof. Where power is created by a statute, it cannot be exercised except under the precise conditions prescribed by that statute. When the venue question was decided erroneously, respondents' corollary, that a valid order may be predicated thereon, simply does not follow.

Respondents' argument is obviously based upon the dissent in *De Beers Consol. Mines* v. *United States*, 325 U. S. 212, which was rejected by Congress when § 262 was replaced by the revised § 1651 (a) as expressive of the construction placed upon the former section by the majority decision.[1]

The traditional rule that re-enactment of a statute creates a presumption of legislative adoption of judicial construction[2] is more than fortified here. For in this instance, we have a specific, well expressed acceptance by the Congress of this Court's interpretation of the section.

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1. 80th Congress Report, No. 308.

2. *Sessions* v. *Romadka*, 145 U. S. 29 (1892). *Shapiro* v. *United States*, 335 U. S. 1 (1948).

The order of transfer in question here, is one respecting a matter lying wholly outside the issues of this case; no decision of this suit on the merits can redress any injury done by the order, for such injury would be the consequence of a judicial act; and, therefore, unless it can be reviewed under 28 U. S. C. § 1651 (a), the harm inflicted can never be corrected. We submit that this presents an extremely close analogy to the situation in the *De Beers* case (*supra*), where this Court stated at page 217:

> "As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262[3] it can never be corrected if beyond the power of the court below."

II.

The Argument as to Venue Properly Falls Within the Scope of the Order Granting Certiorari.

The order allowing certiorari granted the petition but limited review to question 1. This question was split into two sentences in our brief forming Sections I and II thereof. Section III is a comparison of the case at bar with the prerequisites for mandamus enunciated in prior decisions.

The first portion of the question—"Is mandamus an appropriate remedy to vacate the order of severance and transfer *as an unwarranted renunciation of jurisdiction* * * *?" squarely raises the question of power or authority in the District Court to enter the order. Accordingly, as was done in *De Beers Consol. Mines* v. *United States*, 325

3. As re-enacted, now 28 U. S. C. § 1651 (a).

U. S. 212, we proceeded to demonstrate that the District Court was without authority to enter the order under attack.

The specifications of error contained on page 10 in our Petition for Certiorari were "The Court of Appeals erred in deciding that mandamus was not the appropriate remedy under the special circumstances here obtaining, in failing to issue the writ, and in dismissing the petition for mandamus." These specifications bring before this Court whether the Court of Appeals erred in (1) deciding mandamus was not the appropriate remedy; (2) in failing to issue its writ; and (3) in dismissing the petition for mandamus.

In order for this Court to determine whether the situation falls within the allowable use of 28 U. S. C. § 1651(a), it is necessary to inquire whether the District Court was empowered to enter the order of transfer. If, as we contend, venue was proper, and thus the District Court was without power to enter the order, the three specifications of error should then be decided favorably to petitioner. This Court may then, pursuant to 28 U. S. C. § 2106,[4] direct the Court of Appeals to revise and correct its order of dismissal and to issue its writ of mandamus to the District Court. This requested procedure is consistent with the question presented to this Court, the record brought here for review, and will eliminate the circuity of action now so eagerly sought by respondent.[5]

4. "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

5. *City & County of Denver et al.* v. *Denver Union Water Co.*, 246 U. S. 178; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 420.

Respondents' position as to the inappropriateness of this Court's passing upon the venue question, is further weakened by an examination of the Petition for Certiorari and Brief in Support Thereof, together with the Brief for Respondents in Opposition. The venue issue was described in the Petition for Certiorari on pages 2-4, and argued in the Brief under Reason 5 on pages 18-21. At page 21, petitioner clearly set forth its position as follows:

> "The record before the Court of Appeals, presented with this petition, clearly disclosed that venue was proper because defendant Cravey was 'found' and had agents in the District where the suit was brought."

Respondents, in their Brief in Opposition, at page 9, under (d), attacked Reason 5, and concluded with the following:

> "Respondents contend that even if the district judge erred, such an error is not reviewable on a writ of mandamus to the Court of Appeals. Respondents insist, however, that the District Court correctly decided the question of venue and respondents' position on this point is stated in the record. (R. 119-129.)"

The entire record is before this Court; it consists of pleadings and affidavits. No factual issue is presented, since respondent Cravey did not factually negate the affidavits of petitioner. The basic issue before this Court is one of law arising from the uncontradicted facts. If this Court determines from the record, that venue was proper, then, obviously, mandamus is an appropriate remedy, in view of the decisions in the cases of *De Beers Consol. Mines* v. *United States*, 325 U. S. 212, and *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, and the re-enactment of § 262 as § 1651(a).

III.

Neither the Reasons Given Nor the Cases Cited by Respondents Are Addressed to the Principles of Law Governing this Case.

As we have heretofore pointed out, respondents' main theory is identical with that espoused by the minority in the *De Beers* case. In addition, respondents rely heavily on *Roche* v. *Evaporated Milk Ass'n., Inc.*, 319 U. S. 21. What they fail to recognize is that the *Roche* case was merely a decision on a plea in abatement. As this Court said of the District Court in that case, at page 27:

> "Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power, * * *."

Again, in *U. S. Alkali Export Ass'n., Inc.* v. *United States*, 325 U. S. 196, this Court, in effect, distinguished the *Roche* case from the instant case by pointing out, at page 203:

> "But the present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated, would in the ordinary course be reviewed on appeal from the final judgment."

From the other cases cited by respondents, it becomes apparent that they are relying on factual situations such as are contained in the remandment cases, while disregarding the principles of law enunciated by this Court in setting up the standards for the usage of mandamus as demonstrated in Section III of our main brief. A typical example of respondents' misconception is the contention

contained at page 15 of their brief "that this case is ruled by *In Re Chicago, R. I. & P. Ry. Co.*, 255 U. S. 273." In that case this Court discussed general rules governing the use of mandamus and pointed out, at pp. 275-276, among other things, that if "* * * the jurisdiction of the lower court is doubtful * * * or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record * * * or if the complaining party has an adequate remedy by appeal or otherwise * * * the writ will ordinarily be denied."

This Court then specifically said, at page 279:

> "The most that can be said against the District Court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record."

Obviously, this Court could not pass upon the issues presented there without a record of the evidence relied upon by the petitioner. This is a far cry from the situation in the case at bar and serves no useful purpose other than to demonstrate that respondents are not willing to face the realities of the principles adduced from the cases cited in Section III of our main brief.

IV.

Respondents' Misleading Comments Concerning the Availability of Appellate Review Emphasize the Need for Mandamus Here.

Respondents fallaciously contend that the ordinary remedy of appeal is adequate here. They state that if defendant Cravey is found "not guilty" in the Georgia section of the case, petitioner could appeal and obtain a review of the order in question. They conclude that such would

be the result had the motion to dismiss for want of venue been granted. This is not the law. Such an order would not have been final or appealable. *National Bank of Roundout N. Y. v. Smith*, 156 U. S. 330.

Respondents also fail to explain in their theorizing what is to happen to the Florida section of the case insofar as trial and appeal is concerned while the aforementioned appeal is pending in the Georgia section. All of this is predicated, of course, on the conjectural conclusion that the Georgia section would proceed to trial and judgment before the Florida section. Respondents' suggestions do nothing to alleviate the chaos and confusion which will result from the order. No better proof of the inadequacy of appeal and the appropriateness of mandamus as the remedy could be furnished.

All of which is respectfully submitted.

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